IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DOCKET NOS. 12-14676-FF & 12-15147-FF
(Consolidated Appeals)

CAMBRIDGE UNIVERSITY PRESS, ET AL,

Plaintiffs-Appellants,

v.

MARK P. BECKER, ET AL,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
D.C. NO. 1:08-CV-1425 (Evans, J.)

BRIEF FOR AMICUS CURIAE THE COPYRIGHT ALLIANCE IN SUPPORT OF APPELLANTS CAMBRIDGE UNIVERSITY PRESS, ET AL

Of Counsel:

Ronald G. Dove, Jr.
Lindsey L. Tonsager
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5685

Sandra Aistars
Executive Director
COPYRIGHT ALLIANCE
1224 M Street, NW, Suite 101
Washington, DC 20005
(202) 540-2247

February 2, 2013

Case No. 12-14676-FF
Cambridge University Press, et al. v. Mark P. Becker, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

- **Aistars, Sandra, counsel for *amicus curiae* Copyright Alliance**
- Albert, J.L.
- Alford, C. Dean
- Askew, Anthony B., counsel for Appellees
- Association of American Publishers, Inc.
- Banks, W. Wright, Jr., counsel for Appellees
- Bates, Mary Katherine, counsel for Appellees
- Ballard Spahr, LLP, counsel for Appellees
- Becker, Mark P.
- Bernard, Kenneth R., Jr.
- Bishop, James A.
- Bloom, Jonathan, counsel for Appellants
- The Board of Regents of the University System of Georgia
- Bondurant, Mixson & Elmore, LLP, counsel for Appellants

- Cambridge University Press
- Carter, Hugh A., Jr.
- Cleveland, William H.
- Copyright Clearance Center, Inc.
- **Copyright Alliance, *amicus curiae***
- Cooper, Frederick E.
- **Covington & Burling LLP, counsel for *amicus curiae* Copyright Alliance**
- **Dove, Ronald G. Jr., counsel for *amicus curiae* Copyright Alliance**
- Durden, Lori
- Ellis, Larry R.
- Eskow, Lisa R., counsel for Appellants
- Evans, Hon. Orinda D., United States District Judge
- Gentry, Robin L., counsel for Appellees
- Georgia Attorney General's Office
- Georgia State University
- Griffin, Rutledge A., Jr.
- Harbin, John Weldon, counsel for Appellees

- Hatcher, Robert F.
- Henry, Ronald
- Hooks, George
- Hopkins, C. Thomas, Jr.
- Hurt, Charlene
- Jennings, W. Mansfield, Jr.
- Jolly, James R.
- King & Spalding, LLP, counsel for Appellees
- Krugman, Edward B., counsel for Appellants
- Larson, Todd D., counsel for Appellants
- Leebern, Donald M., Jr.
- Lerer, R.O., retired counsel for Appellees
- Levie, Walter Hill, III, counsel for Appellees
- Lynn, Kristen A., counsel for Appellees
- Meunier Carlin & Curfman, LLC, counsel for Appellees
- McIntosh, Scott
- McMillan, Eldridge
- Miller, Richard William, counsel for Appellees

- Moffit, Natasha Horne, counsel for Appellees
- NeSmith, William, Jr.
- Olens, Samuel S., counsel for Appellees
- Oxford University Press, Inc.
- Oxford University Press, LLC
- Oxford University Press USA
- Palm, Risa
- Patton, Carl. V.
- Poitevint, Doreen Stiles
- Potts, Willis J., Jr.
- Pruitt, Neil L., Jr.
- Quicker, Katrina M., counsel for Appellees
- Rains, John H., IV, counsel for Appellants
- Rich, R. Bruce, counsel for Appellants
- Rodwell, Wanda Yancey
- SAGE Publications, Inc.
- Seamans, Nancy
- Schaetzel, Stephen M., counsel for Appellees

- Singer, Randi W, counsel for Appellants
- Smith, Scott
- State of Georgia
- Stelling, Kessel, Jr.
- Tarbutton, Benjamin J., III
- Tenny, Daniel
- **Tonsager, Lindsey L., counsel for *amicus curiae* Copyright Alliance**
- Tucker, Richard L.
- The Chancellor, Masters and Scholars of the University of Oxford
- Vigil, Allan
- Volkert, Mary Josephine Leddy, counsel for Appellees
- Wade, Rogers
- Walker, Larry
- Weil Gotshal & Manges LLP, counsel for Appellants
- Whiting-Pack, Denise E., counsel for Appellees
- Wilheit, Philip A., Sr.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting copyright as an engine for creativity, jobs, and growth. It promotes the interests of individual authors from a diverse range of creative industries — including , for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers — and the small businesses that are affected by the unauthorized use of their works. All parties have given written consent to the submission of amicus briefs. This brief was not authored in whole or in part by counsel for any party to this appeal, nor was it funded by such party or any party's counsel. No person other than the amicus curiae, its members, or its counsel contributed money intended to fund this brief.

The Copyright Alliance supports fair use, and is dedicated to ensuring that the balance the Constitution and Congress struck in providing robust copyright protections to authors and meaningful exceptions for fair use is maintained. The Copyright Alliance is concerned that the district court disrupts this balance by improperly favoring Georgia State University's systematic and wholesale reproduction and distribution of copyrighted works to the detriment of authors and, ultimately, society as a whole. The Copyright Alliance submits this brief to ensure

that independent authors and small businesses continue to have incentives to create works that are vital to our nation’s cultural, scientific, and technological progress.

STATEMENT OF THE ISSUES

Did the district court err in articulating an unprecedented fair use defense allowing the wholesale and systematic reproduction of individual authors' copyrighted contributions to larger copyrighted works, denying them licensing revenues that spur the creation of new works?

INTRODUCTION AND SUMMARY OF ARGUMENT

The copyright protections afforded by the Constitution and the Copyright Act are crucial to creators of the expressive works so central to our nation's cultural and scientific development. In enacting the Copyright Act, Congress recognized that creators are incentivized to create when given control over the distribution and use of their work. The fair use defense allows limited copying and distribution that do not threaten the author's legitimate interests. When properly applied, the fair use defense strikes a balance between two important goals: encouraging creativity and facilitating the flow of public information.

The decision below upsets this balance, creating a standard that, if upheld, will permit widespread unauthorized copying and distribution of copyrighted works. This brief identifies three key flaws in the district court's reasoning that impact members of the Copyright Alliance.

First, the district court improperly applied the market harm analysis, basing its findings entirely on whether licenses were available for the works included in the digital coursepacks. Contrary to the court's findings, digital licenses were available for the works at issue. Moreover, as discussed in Part II.A, below, an author's choice not to license a work in a particular format does not sacrifice its copyright protection. In addition to being legally and factually

unsound, the district court's reasoning could do serious harm to independent creators in particular, who may not have the funding or technological capability to provide licenses in every conceivable format.

Second, the district court's bright-line rule for the amount of a work that an institution may copy as fair use is arbitrary and overly expansive. As discussed in Part II.B, below, this approach obliterates the balance and nuance required by copyright law. The district court failed to consider that, particularly with collective works like those at issue here, its rule would permit the copying of an entire independently copyrightable contribution. The court's rule likewise would permit copying of the very "heart" of a work, such as a key movement from a musical score or climactic scene in a movie. An arbitrary, purely mathematical bright-line rule which runs counter to core doctrines of copyright law cannot be allowed to stand.

Finally, as discussed in Part II.C, below, the district court erred in treating scholarly works as merely informational and therefore not entitled to robust copyright protection. This Court and others have held that such works possess sufficient creativity not only to be protected by copyright but also to defeat a fair use defense. Rather than thoughtfully consider the creativity and judgment in formulating, testing, and expressing an original thesis, the district court dismissed such works as informational only. In doing so, the district court did a

disservice to the creative work done by authors of non-fictional books, articles, photographs, illustrations, and documentaries.

ARGUMENT

I. THE HISTORY AND DEVELOPMENT OF COPYRIGHT LAW DEMONSTRATES THE IMPORTANCE OF PROVIDING INDIVIDUAL CREATORS WITH THE INCENTIVES NECESSARY TO PRODUCE ORIGINAL WORKS.

The Constitution and our nation's copyright laws are premised on the principle that providing individual creators robust protections and exclusive control over their works is critical to developing our society's rich cultural heritage, scientific knowledge and technological progress. Individual creators are the engines of creativity, jobs, and growth in the United States. For example, in Georgia alone, Copyright Alliance members include or employ individual journalists and other writers who contribute to more than seventy daily and weekly newspapers; individual recording artists, sports announcers, and radio personalities who contribute to approximately 450 AM and FM radio station broadcasts; more than 1,400 professional photographers; and nearly 11,000 individuals in the software industry. In addition, Copyright Alliance member the American Society of Composers, Authors and Publishers (ASCAP) has more than 45,000 members in just the three states of Georgia, Florida, and Alabama. By providing these authors the exclusive right to control whether and how others may reproduce and publicly distribute their works, the copyright laws enable these individuals to reap the

economic rewards that spur even greater creativity to society's benefit in the form of a larger and more diverse range of educational, cultural, and scientific works.

To ensure that the exclusive rights afforded to authors increase the public's access to and use of copyrighted works, Congress and the courts developed the fair use defense as a safety valve, balancing copyright protections with society's interest in engaging in limited, useful, and transformative uses of such works. Fair use is an important component of our copyright laws, but fair use does not permit the systematic or wholesale reproduction of copyrighted works, which would upset the careful balance underlying our nation's copyright system.

A. From The Earliest Days Of American History, Strong Copyright Protections Have Existed To Encourage Progress By Protecting The Rights Of Individual Authors And Creators.

It is well settled that robust copyright protections for individual authors are critical to the promotion of free expression and to the development of the arts and sciences. Copyright is so fundamental to our nation's values that it is enshrined in our Constitution, which empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Even before the drafting of the Constitution, twelve of the thirteen original states passed laws protecting authors' copyright interests. 8-7 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 7 (Matthew Bender, Rev.

Ed. 2012). For example, the 1783 Massachusetts Act recognized the critical role that individual authors play in promoting the public interest and technological progress, stating that "the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons." *Id.* The Act also emphasized that these contributions would not be possible if authors did not have the "legal security of the fruits of their study." *Id.*

These basic principles are just as true today as they were in the earliest days of the republic. Strong copyright protections provide creators with the economic incentives that are necessary to ensure contributions to the arts and sciences. Our Constitution protects authors' rights because "[t]o promote the progress of useful arts, is the interest and policy of every enlightened government." *Grant v. Raymond*, 31 U.S. 218, 241 (1832).

Pursuant to the Copyright clause, Congress has enacted copyright laws that provide individual authors broadly-defined, exclusive rights in their works. *See, e.g.*, 17 U.S.C. § 106 ("[T]he owner of copyright . . . has the exclusive rights to . . . reproduce the copyrighted work in copies or phonorecords . . . [and] to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .").

The Copyright Act of 1976 sets forth parameters under which copyright applies to contributions to collective works such as those at issue here. Section 101 of the Copyright Act defines a "collective work" as a work in which "a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101. Section 201 states that "copyright in each separate contribution is distinct from copyright in the collective work as a whole . . . ." 17 U.S.C. § 201(c). Congress recognized "the basic principle that the author of the contribution [to a collective work] is, as in every other case, the first owner of a copyright in it." H.R. Rep. No. 94-1476, at 122 (1976). The protection of authors who contribute their works to collections is crucial to encourage the creation of copyrighted works by individuals and small businesses in a variety of different media, including, for example, photographers, composers, and authors who contribute scholarly works to textbooks and journals.

Underlying these copyright laws "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ." *Mazer v. Stein*, 347 U.S. 201, 219, 74 S. Ct. 460, 471 (1954). By providing authors exclusive control over their works, the copyright laws provide individual authors economic incentives to create. In turn, by providing "contributors to the store of knowledge a fair return for their labors," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,

546, 105 S. Ct. 2218, 2223 (1985), the copyright laws ensure that the public has continued access to a rich and diverse range of works. In this manner, robust copyright protections provide clear benefits to the public. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 477, 104 S. Ct. 774, 806 (1984) (observing that the copyright laws "reward[] the individual author in order to benefit the public").

B. The Fair Use Defense Is Intended To Promote, Not Hinder, Individual Creativity.

Copyright law protects creators' ability to fund their efforts based on the value of what they create. Yet copyright law, through the fair use defense, also recognizes that there are instances where these necessary protections can sweep too broadly. The fair use defense is meant to protect authors' rights to their works while creating a safety valve that ensures that the public, including other authors, can engage in "limited and useful forms of copying and distribution that are tolerated as exceptions to copyright protection." *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) (rejecting fair use defense for the wholesale copying of news broadcasts); *see also Sony Corp. of America*, 464 U.S. at 429, 104 S. Ct. at 782.

To determine whether a use is sufficiently limited to be fair, the copyright law sets forth four factors for courts to consider: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and

substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. This is necessarily a nuanced, case-by-case inquiry. Courts are tasked with evaluating the use as a whole in light of the basic balance that copyright is meant to establish. *Sony Corp. of America*, 464 U.S. at 448, 104 S. Ct. at 792. Although no one factor is dispositive, in cases involving non-transformative uses the fourth factor on market harm deserves considerable weight. *See Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1388 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997) ("In the context of nontransformative uses . . . and except insofar as they touch on the fourth factor, the other statutory factors seem considerably less important.").

When properly applied, fair use fosters creativity by enabling independent creators to use copyrighted works in ways that produce new cultural contributions that otherwise might not have been possible. Without fair use, for example, individuals could not produce transformative parodies or criticism of original works because authors are unlikely to grant permission for such uses. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592, 114 S. Ct. 1164, 1178 (1994) ("Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."); Wendy J. Gordon, *Fair Use as*

Market Failure, 82 COLUM. L. REV. 1600, 1633 (1982) ("Even if money were offered, the owner of a play is unlikely to license a hostile review or a parody . . . ."); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276-77 (11th Cir. 2001) (parody of *Gone with the Wind* constitutes fair use). Fair use also fosters scholarly writing and research by permitting the use of short quotations of copyrighted works for purposes of comment. *See, e.g., Sundeman v. Seajay Soc., Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998).

Courts rightly and repeatedly have rejected, however, attempts to use the fair use defense to permit the widespread, systematic reproduction and distribution of copyrighted works for non-transformative purposes. *See, e.g., Pacific & Southern Co.*, 744 F.2d at 1496 (11th Cir. 1984) (use of copyrighted news broadcast did not qualify as fair use). Such uses supplant the market for the copyrighted work without contributing to the public's store of creative works. The refusal of the courts to extend fair use to permit widespread, systematic reproduction has been demonstrated in a broad variety of contexts, including those that are noncommercial or educational. *See, e.g., Soc'y. of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012); *Princeton Univ. Press*, 99 F.3d at 1384 (copy shop's reproduction and sale of copyrighted works as "coursepacks" was not fair use); *Weissmann v. Freeman*, 868 F.2d 1313, 1324-26 (2d Cir. 1989) (rejecting fair use defense where professor

copied his assistant's scientific paper for use in review course); *Marcus v. Rowley*, 695 F.2d 1171, 1171, 1175 (9th Cir. 1983) (rejecting fair use defense where teacher copied and distributed to students excerpts from another teacher's copyrighted booklet); *Encyclopaedia Britannica Educ. Corp. v. C.N. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (rejecting fair use defense for systematic reproduction and distribution of educational films for classroom use).

The fair use doctrine is also "media neutral" in that it should be applied in the same manner whether the work is reproduced or distributed in digital or paper form. *See Greenberg v. Nat'l Geographic Soc.*, 533 F.3d 1244, 1257 (11th Cir. 2008) (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 502, 121 S. Ct. 2381 (2001)). This principle mandates that digital coursepacks like those at issue here should be analyzed in the same manner as the paper copy cases cited above.

Skepticism toward an over-broad fair use defense reflects the fact that fair use must be balanced with the individual author's right to control whether and how hercopyrighted work is reproduced and distributed. Robust copyright protections incentivize authors — and, in particular, independent creators — to contribute to the diverse range of works that are used in educational settings, including not only chapters in scholarly books, but also articles in journals and magazines, textbook chapters, illustrations and photographs, documentaries and

other audiovisual materials, musical compositions and sound recordings, and software. If fair use permitted systemic and wholesale use of these important contributions, it would discourage creativity by devaluing individual authors' creations, harming not only the author but society as a whole.

As explained in the following sections, the decision below threatens to render copyright incentives ineffective by permitting and encouraging the widespread, systematic copying and distribution of copyrighted works without the payment of license fees. This result discourages the creation of contributions that Congress intended the copyright laws to promote.

II. SERIOUS ERRORS IN THE DECISION BELOW UNDERMINE OUR NATION'S COPYRIGHT SYSTEM.

The district court erred in at least three material respects that will have serious implications for our nation's copyright system. First, the district court's flawed analysis of the market for plaintiffs' works and its dismissal of the resulting harm frustrates the purpose of the copyright laws and conflicts with longstanding precedent. Second, the district court's application of an arbitrary and over-broad bright-line standard diminishes independent authors' incentives to contribute to larger collective works. Third, the district court's conclusion that scholarly or educational works are purely informational conflicts with long-settled case law and disregards the important work of many creative individuals. Each of these errors warrant reversal of the decision below, because each materially alters the balancing

of the statutory fair use factors. *See MiTek Holdings v. Arce Eng'g Co.*, 89 F.3d 1548, 1553 (11th Cir. 1996) (setting forth the applicable standard of review).

A. The District Court's Approach For Measuring The Impact On The Potential Market Frustrates The Purpose Of The Copyright Laws And Conflicts With Longstanding Precedent.

The district court acknowledged that the fourth fair use factor — which considers the effect the infringement has on the potential market for or value of the copyrighted work — leans against fair use in this case because "the excerpts were mirror-image copies favor[ing] market substitution." *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190, 1227 (N.D. Ga. 2012). The court nonetheless arbitrarily concluded that "a small excerpt does not substitute for the book as a whole" and adopted a results-oriented test under which the vast majority of defendants' uses considered in the decision below were held to be fair. *Id.* at 1236.

The district court dismissed claims of market harm unless the plaintiffs submitted evidence showing "that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offer excerpts in a format . . . which is reasonably convenient for users."[1] *Id.* at 1237. In so finding,

[1] Although the district court properly stated at the outset that "Defendants have the burden of proof on all [e]lements of the fair use defense," *Cambridge University Press*, 863 F. Supp. 2d at 1235, it then shifted this burden to the plaintiffs, without citing any legal authority, because "Plaintiffs are advocates of the theory that the (continued…)

the district court ignored the fact that plaintiffs' works were already available for digital licensing at a per-page, per-student rate. Appellants' Br. at 29-35. Where, as here, the copyright owner is already successfully exploiting the market, courts have recognized that unauthorized use may adversely affect the potential market. *See, e.g.*, *Princeton Univ. Press*, 99 F.3d at 1388 ("A licensing market already exists here . . . ."); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) (unauthorized use "should be considered 'less fair' when there is a ready market or means to pay for the use"); *Harper & Row*, 471 U.S. at 568, 105 S. Ct. at 2234 (widespread unlicensed copying "would adversely affect the *potential* market for the copyrighted work") (citation omitted).

Moreover, even if licenses had not been available, finding that plaintiffs' works could legally be copied and distributed without a license in such a broad range of circumstances deprived plaintiffs the opportunity to license those works in the future. Users will not seek a license when, relying on the standard established by the district court, they can copy and distribute the work without paying any license fees. One of the primary goals of the copyright law is to ensure that creators receive an economic return for their work and are thereby incentivized to continue creating. Enabling authors to determine whether and when to license

---

availability of licenses shifts the factor four fair use analysis in their favor." *Id.* at 1237.

their work, and ensuring that they are able to receive a fair return when they do, is crucial to achieving that goal. *See Princeton Univ. Press*, 99 F.3d at 1391 (loss of licensing revenue could "only have a deleterious effect upon the incentive to publish academic writings").

The district court's approach also poses insurmountable challenges to independent creators and small businesses who do not have the financial resources or technical ability to implement costly, sophisticated licensing management systems for excerpts of their works in myriad formats. For these creators, fulfilling requests for different excerpts in order to avoid unauthorized copying could divert them from the creation of new works.

Compounding this burden, the author would lose the right to seek license fees if he or she failed to meet the demand for the excerpt in a particular format more "reasonably convenient" to the requesting institution, even if the author makes excerpts available for license in another format. For example, if a documentary filmmaker licenses excerpts in the MPEG-2 format used for DVDs, under the district court's reasoning, an institution could avoid having to pay the documentary filmmaker a license fee simply by requesting the excerpt in the H.264 format used for Blu-ray discs. By punishing individual, independent authors who are unable to provide on-demand, multi-format licensing, the district court's decision frustrates, rather than promotes, the copyright law's objectives. Authors

would be encouraged to think twice before contributing to a collective work in order to avoid having to process license requests covering a wider variety of formats.

The high cost to independent authors resulting from the court's decision is magnified because the systematic reproduction and public distribution of popular excerpts where on-demand, multi-format licensing is unavailable will be replicated by institutions across the country and will not be limited to scholarly or informational books. Emboldened by the district court's articulation of the fair use defense and taken to its [il]logical conclusion, organizations nationwide could stop purchasing multiple copies of, for example, musical scores where only a particular movement or part is desired and assert that they are entitled to make "fair use" copies because only entire musical scores typically are made available for purchase or license. The revenue stream for individual composers would be devastated. Similarly, by applying the district court's quantitative thresholds, a college art history professor could distribute numerous reprints of original pieces of artwork published in art history textbooks, arguing that textbook publishers typically do not offer a license for the specific page of the book on which the artwork appears — often because the publisher does not itself have the rights to offer such a license. Permitting this type of conduct directly undermines the directive of the

Constitution and the copyright laws to "reward[] the individual author in order to benefit the public." *See Sony Corp.* 464 U.S. at 429, 104 S. Ct. at 806 (1984).

The resulting harm to the public and our nation's educational system demonstrates why treating the widespread, systematic copying and distribution of an author's contribution to a copyrighted work as fair use would run counter to the intent of our copyright laws. If every institution could purchase a single copy of a collective work and distribute digital copies of individual contributions via an electronic reserve system, individual authors would suffer billions of dollars of economic harm in the form of lost sales and licensing fees. The purpose of the copyright law — rewarding and recognizing contributors — would be foiled entirely. Authors would be discouraged from contributing copyrighted works (not only of a scientific or educational nature) to larger collective works, and our nation's cultural, scientific, and technological progress would slow considerably. "If the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is virtually obliterated in the name of fair use." 4-13 Nimmer *supra.* at § 13.05[E][1]; *see also, e.g.*, H.R. Rep. No. 90-83 at 35 ("Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.").

Finally, by in effect forcing authors to offer on-demand, multi-format licenses for excerpts of their works, the decision below also is contrary to well-settled case law holding that copyright owners have the right to control whether and how to publish and publicly distribute their copyrighted works. *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 228-29, 110 S. Ct. 1750, 1764 (1990) ("[A]lthough dissemination of creative works is a goal of the Copyright Act, . . . nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright."); *Harper & Row*, 471 U.S. at 555, 105 S. Ct. at 2228 (favoring author's right to control first publication of work over "any short-term 'news value' to be gained from premature publication of the author's expression"); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001) (defendants violated law by circumventing DVD encryption technology to enable viewing of work on unlicensed platforms); *UMG Recordings, Inc., v. MP3.com*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) ("[A] copyrightholder's 'exclusive' rights. . . include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable."). As the Second Circuit held in *Corley*, "[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method . . . ." *Corley*, 273 F.3d at 458. An author's right to control

his or her work trumps the user's desire to access the work in a more convenient format.

B. The District Court's Application Of An Arbitrary And Expansive Quantitative Fair Use Standard Diminishes Independent Authors' Incentives To Contribute To Larger Works.

The district court held that the following two formulas should be applied to determine the amount of a copyrighted work an institution may copy as fair use: (1) if the work < 10 chapters, then ≤ 10% of the work's total pages[2] may be copied; and (2) if the work ≥ 10 chapters, then ≤ 1 chapter (or its equivalent) may be copied. *Cambridge University Press*, 863 F. Supp. 2d at 1243.

Applying such an arbitrary and expansive bright-line formula to calculate whether a use is fair conflicts with the more nuanced approach that courts generally take in applying the copyright laws. *See, e.g.*, *Campbell,* 510 U.S. at 577, 114 S. Ct. at 1170 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."); *Harper & Row*, 471 U.S. at 588, 105 S. Ct. at 2244 ("Congress 'eschewed a rigid, bright-line approach to fair use.") (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31, 104 S. Ct. 774, 792 n.31 (1984)); *Ty, Inc. v.*

[2] In calculating the total number of pages to which the 10 percent limitation applies, the district court held that pages used for dedications, acknowledgements, the foreword, the preface, and the index may be included. *Cambridge University Press*, 863 F. Supp. 2d at 1229-30. This approach permits a greater number of pages from the body of the work to be copied and distributed than if these auxiliary materials were excluded from the calculation.

Publ'ns Int'l, 292 F.3d 512, 522 (7th Cir. 2002) ("[T]he four factors are a checklist of things to be considered rather than a formula for decision . . . ."). The district court's approach impermissibly allows for the copying and distribution of independently copyrightable works in their entirety, and in many cases, the "heart" of the work.

The bright-line formula developed by the district court fails to address the fact that each contribution to a collective work holds its own copyright "distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." 17 U.S.C. § 201(c); H.R. Rep. No. 94-1476, at 122 (1976). The district court's bright-line rule allows copying of up to a full chapter of a collective work, which would in many cases mean the wholesale reproduction of an entire independently copyrightable contribution. *See, e.g.*, *Texaco*, 60 F.3d at 926 ("each of the eight articles in [the *Journal of*] *Catalysis* was separately authored and constitutes a discrete 'original work[] of authorship"); *Encyclopaedia Britannica Educ. Corp. v. C.N. Crooks*, 447 F. Supp. 243, 251 (W.D.N.Y. 1978) (each article in a medical journal "could be considered a discreet [*sic*] whole"). Moreover, this rule would function in an entirely arbitrary fashion. In a one-hundred-page collection of individual works, an eleven-page article would be protected by copyright, and a ten-page article would not be protected. Authors would be inclined to think twice before contributing to collections, knowing that if the work

fell within the arbitrary benchmarks established by the lower court, the work could be copied and widely distributed without payment of a license fee.

The district court's formula is particularly damaging to individual authors who make illustrations, photographs, and similar pictorial or graphic contributions available in larger works. A broad variety of scholarly books depend largely on visual works to convey information, including medical textbooks, field guides, surveys of art history, and books used in web design, architecture, animation, and motion picture production courses. Without images, those works would be of little purpose to their users. Applying the district court's articulation of the fair use defense, an institution could appropriate wholesale any photographs or images contained within an excerpt of a scholarly or educational book, notwithstanding that the photograph might be highly expressive its use might not further the professor's educational purpose. The district court provides no reasoning or analysis explaining why such appropriation should be excused as fair use. By undervaluing the contributions of independent authors whose works constitute a separable whole, the district court's quantitative approach fundamentally misunderstands what incentivizes authors to contribute to collective works; overlooks the devastating impact that the widespread, systematic copying and distribution of these authors' contributions without a license will have on licensing revenues so critical to the creation of scholarly and educational works (an

impact that is magnified because such uses may be replicated across the country); and fails to appreciate that institutions will be emboldened to implement e-reserve systems not only for excerpts of scholarly or educational books, but also for a wide range of other highly-creative and separately copyrightable works, including musical compositions and sound recordings, films, illustrations, photographs, graphic designs and other works of visual art.

That the Copyright Act requires a more nuanced approach is also reflected in the "heart of the work" analysis, which allows courts to consider, when only a relatively small part of a work is used, whether that portion is of such a qualitative nature so as to constitute the "heart" or a "critical part" of the work. *See, e.g.*, *Harper & Row*, 471 U.S. at 565, 105 S. Ct. at 2233; *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1312 (11th Cir. 2008). While a copyright owner need not establish that the portion taken is the heart of the work to obtain protection, courts recognize that, when dealing with short excerpts, sometimes the substance of what is copied matters more than its length, and will reject a fair use defense on that basis. The climactic scene of a movie, the best-known portion of a musical score, images from seminal works like *Meggs' History of Graphic Design*, or Pecktal's *Designing and Drawing for the Theater* or the concluding paragraphs of an article all may qualify as the "heart" of the work but would fail the court's bright-line test.

By marginalizing the importance of the traditional "heart of the work" analysis, the district court does incalculable harm to individual contributors whose works, though they may comprise fewer pages than some arbitrary, predefined percentage of the larger work, are the most sought after or popular portion of the larger work.[3] Contributions to collective works often enrich our cultural, human, and scientific understanding in ways which cannot be defined formulaically. A particular contribution to a collection may very well be the heart of that collection, and allowing unlicensed reproduction of such a contribution would clearly do harm to the work as a whole. While the district court was dismissive of the widely recognized view that excerpts that "cover distinct, separately titled subtopics, so that almost none has a dominant relationship to the substance of the work as a whole" could constitute the "heart" or a "critical part" of a work, *Cambridge University Press*, 863 F. Supp. 2d at 1233, these kinds of contributions are often seminal works in the educational setting, as demonstrated by the repeat use of many of the plaintiffs' works — even after the plaintiffs filed the underlying complaint in this case. By applying bright-line, mathematical formulas and marginalizing the evaluation of the qualitative significance of the individual author's contribution, the district court diminishes the incentives for such authors

[3] In one instance, the district court did find that the heart of a work had been copied but nevertheless concluded based on the other factors that the copying constituted fair use. *Cambridge Univ. Press*, 863 F. Supp. 2d at 1359.

to contribute to larger works and, in the process, does a disservice to the public. *See, e.g.*, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 587, 114 S. Ct. 1164, 1175 (1994) (the court must think "not only about the quantity of the materials used, but also about their quality and importance, too").

C. The District Court's Conclusion That Scholarly Or Educational Works Are Entitled To Only Minimal Protection Conflicts With Long Settled Case Law And Will Adversely Affect A Wide Range Of Creative Individuals And Small Businesses.

The district court erred in holding that scholarly and educational works are purely informational and undeserving of robust copyright protection. *See Cambridge University Press*, 863 F. Supp. 2d at 1226-27, 1242. Despite acknowledging that such works "contain material of an evaluative nature, giving the authors' perspectives and opinions," *Id.* at 1226, the district court improperly postulated that fair use is favored simply because scholarly and educational works are "informational in nature" and are not fictional. *Id.* at 1225 n.37, 1226 (emphasizing that "the works at issue in this case do not contain fictional elements" and that "none of the books at issue are fictional").

As this Court and others have held, the fact that a work is primarily informational does not mean that it is not imbued with the originality and creativity that copyright seeks to protect. *Peter Letterese & Assocs.*, 533 F.3d at 1312 (11th Cir. 2008) ("[N]otwithstanding [the book's] informational nature . . . [the author] utilizes original expression that surpasses the bare facts necessary to communicate

the underlying technique."). Because "there are gradations as to the relative proportion of fact and fancy" even where a work is deemed to be informational, it is critical to carefully examine the work to determine whether it is more like the "sparsely embellished map[]" for which copyright is thin or an "elegantly written biography" for which the copyright law's protections are critical to encourage creation. *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563, 105 S. Ct. 2218, 2232 (1985)); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S. Ct. 1282, 1289 (1991); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1140-43 (11th Cir. 2007) (discussing the fact-expression dichotomy); 4 William F. Patry, *Patry on Copyright* § 10:138 (Feb. 2012) ("a broad rule permitting more generous fair use of all factual works than of all fictional works should be avoided"). By likening scholarly and educational works to factual compilations in which copyright protections are thin, *Cambridge University Press*, 863 F. Supp. 2d at 1225 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 1282 (1991)), the district court failed to appreciate that scholarly and educational works are often, if not usually, expressive, reflecting "creativity, imagination, and originality in their language, structure, [and] word choice." *Soc'y. of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61-62 (1st Cir. 2012) (rejecting fair use defense and concluding that English translations of ancient Greek religious texts "fall closer to

the creative end of the copyright spectrum than the informational or factual end"). Indeed, the district court previously found that non-fictional educational materials may contain creative elements. *SCQuARE Int'l, Ltd., v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1363 (N.D. Ga. 2006) (training manuals used to teach problem solving and communication skills were not factual compilations and contained creative elements).

In dismissing the scholarly works before it as purely informational, the court did a disservice to their creators and demonstrated a misunderstanding of the scholarly process. With regard to *The Sage Handbook of Qualitative Research (Third Edition)*, the court simply asserted that "*The Sage Handbook of Qualitative Research* is a non-fiction work that analyzes the theory and practice of qualitative research. The presentation is informational in nature." *Cambridge University Press*, 863 F.Supp.2d at 1259. Analysis of the theory and practice of an academic field is a cornerstone of academic writing, requiring that the creator exercise independent judgment in determining which theories to include and how to include them, and add his own original impressions. The idea that a work presenting analysis of academic theories is the equivalent of a bare presentation of solely factual information diminishes the creative work that these authors and other creators do. According to the district court's reasoning, non-scientific works would be afforded robust protection, while a treatise or compilation of scholarly

works could be freely copied by the very users to whom the authors hoped to license them.

Courts have repeatedly rejected claims of fair use where, as here, a defendant engages in the widespread, systematic copying and public distribution of educational or informative works. *See Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989) (no fair use where professor copied scientific paper); *Marcus v. Rowley*, 695 F.2d 1171, 1172 (9th Cir. 1983) (rejecting fair use where teacher copied and distributed to students excerpts from another teacher's copyrighted booklet); *Encyclopaedia Britannica Educ. Corp. v. C.N. Crooks*, 542 F. Supp. 1156, 1178 (W.D.N.Y. 1982) (no fair use for systematic reproduction and distribution of educational films for classroom use, stating that "the educational contents of the works in this case cannot be employed as a means to justify as in the public interest the extensive and systematic copying as documented here"); *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980) (rejecting fair use of "educational" biography). Instead of penalizing the authors of educational works, most courts have concluded that the second fair use factor, which considers the nature of the copyrighted work, either favors the plaintiff or should not be afforded any weight. *See, e.g., Soc'y. of the Holy Transfiguration Monastery*, 689 F.3d at 61-62 (1st Cir. 2012) (second factor

favored plaintiffs because works "fall closer to the creative end of the copyright spectrum than the informational or factual end"); *Marcus*, 695 F.2d at 1176.

Applying a nuanced fair use analysis is particularly necessary here because the consequence of enabling institutions to engage in the widespread, systematic copying and distribution of scholarly and educational materials without paying any license fee would not be limited to Georgia State University or to excerpts of scholarly or educational books. Rather, the practical effect of the decision below will be to expand the sorts of fair use claims upheld here to thousands of institutions and to a diverse range of fact-based works that may be used in a similar setting, including, for example, magazine and journal articles, textbook chapters, excerpts of documentaries and other films, television episodes, entire photographs contained in larger works, and maps.[4] Such unlicensed, en masse copying and public distribution would plague the most valuable, in-demand materials, thereby undermining the creation of the very works that our copyright system is intended to protect. *See Harper & Row*, 471 U.S. at 559, 105 S. Ct. at 2229-30 ("It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of the greatest importance to the public."). The district court cannot, and should not, ignore the devastating effect such a result will

[4] This is true notwithstanding the fact that the decision below did not specifically address these types of works.

have on the creation of educational works and, more broadly, public education. The Second Circuit articulated this danger well when it held that a lower court's "failure to consider incentives when weighing this factor was an error of law." *Weissmann*, 868 F.2d at 1325. By enabling defendants and others like them to engage in systematic — and in many cases wholesale — reproduction of an individual, independent author's contribution to a larger work, such authors will have little incentive to contribute to scholarly or educational works.

CONCLUSION

As the Constitution's framers recognized, the public benefits when authors are rewarded for their creative endeavors. While the Copyright Alliance fully supports fair use, when properly applied, the decision below is inconsistent with the purpose and intention of the copyright laws by permitting the wholesale and systematic reproduction of authors' copyrighted contributions to larger copyrighted works under the guise of fair use, denying them licensing revenues that spur the creation of new works. The Copyright Alliance respectfully asks that this Court reverse the opinion of the district court.

Respectfully submitted,

Ronald G. Dove, Jr.
Lindsey L. Tonsager
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-5685

Sandra Aistars
Executive Director
COPYRIGHT ALLIANCE
1224 M Street, NW, Suite 101
Washington, DC 20005
(202) 540-2247

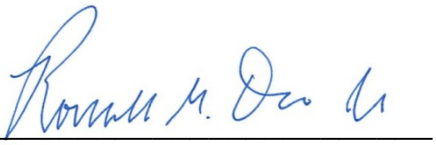
Counsel for the Copyright Alliance

February 2, 2013

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2010, Times New Roman, 14 point.



Ronald G. Dove, Jr.
Attorney for Amicus Curiae
February 2, 2013

CERTIFICATE OF SERVICE

I certify that on February 2, 2013, I directed that an original plus six copies of this Amicus Brief be sent by Federal Express to the Clerk of Court for the U.S. Court of Appeals, Eleventh Circuit, for filing on February 4, 2013, and that a copy will also be served by First Class Mail on counsel listed below.

R. Bruce Rich
Randi W. Singer
Jonathan Bloom
Lisa R. Eskow
Todd D. Larson
Weil Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
Tel.: (212) 310-8000

Edward B. Krugman
John H. Rains IV
Bondurant Mixson & Elmore, LLP
1201 W. Peachtree Street NW, Suite 3900
Atlanta, GA 30309
Tel.: (404) 881-4100

Attorneys for Plaintiffs-Appellants

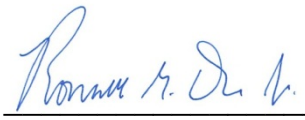
Antohny B. Askew
Stephen M. Schaetzel
Meunier Carlin & Curfman, LLC
817 W. Peachtree Street, N.W., Suite 500
Atlanta, GA 30309
Tel.: (404) 962-6100

John Harbin
Mary Katherine Bates
King & Spalding
1180 Peachtree Street
Atlanta, GA 30309
Tel.: (404) 572-4600

Katrina M. Quicker
Richard W. Miller
Ballard Spahr LLP
999 Peachtree Street, Suite 1000
Atlanta, GA 30309
Tel.: (678) 420-9300

Mary Josephine Leddy Volkert
Assistant State Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334
Tel.: (404) 656-3343

Attorneys for Defendants-Appellees



Ronald G. Dove, Jr.